

No. 12,212

IN THE

United States Court of Appeals  
For the Ninth Circuit

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SHOSO NII,

*Appellant,*

VS.

TOM C. CLARK, Attorney General as  
Successor to the Alien Property  
Custodian,

*Appellee.*

Upon Appeal from the District Court of the United States  
for the Territory of Hawaii.

BRIEF FOR SHOSO NII, APPELLANT.

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FILED

SEP 16 1949

PAUL P. O'BRIEN,  
CLERK



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Upon Appeal from the District Court of the United States  
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**BRIEF FOR SHOSO NII, APPELLANT.**

---

**JURISDICTIONAL STATEMENT.**

This is an action by the appellant against the Attorney General of the United States as successor to the Alien Property Custodian involving the return of certain parcels of real property situated in the Territory of Hawaii brought under the Trading with the Enemy Act, as amended, 50 USCA Sec. 9(a) and also for ancillary equitable relief arising out of the same matter in conjunction therewith. (Tr. pp. 2-19.)

The Attorney General replied and in conjunction therewith filed on May 3, 1948 a counterclaim under

Section 24(1) of the Judicial Code (28 USC Sec. 41(1)) and Section 17 of the Trading with the Enemy Act, as amended (50 USC App. Sec. 17). (Tr. pp. 20-25.)

On May 6, 1948, the appellant filed his answer to the counterclaim. (Tr. p. 26.)

On August 23, 1948, the appellee initiated a motion for summary judgment (Tr. p. 40) which was denied.

On September 9, 1948, the appellee requested certain admissions of facts (Tr. pp. 84-92) and certain facts were admitted by the appellant. (Tr. pp. 93-94.)

On October 26, 1948, the appellee filed a petition to have the appellant turn over summarily to the appellee \$3,169.01 held by the appellant in accordance with the "Turnover Directive" mentioned in said petition. (Tr. pp. 98-105.) Upon a hearing thereon the Court on November 19, 1948, refused the petition for summary order. (Tr. pp. 107-110.)

On November 29, 1948, and thereafter a trial was held on the merits and "Findings of Facts", and "Conclusions of Law" by the Court were filed on January 26, 1949. An "Opinion" was also filed on January 26, 1949. (Tr. pp. 145-157.)

On January 26, 1949, a judgment order against the appellant and for the appellee was entered on the petition of the appellant and on the counterclaim the Court entered an appropriate order in favor of the appellee. (Tr. pp. 158-159.) Also on said January 26, 1949, an "Order Directing Accounting and Payment

under Section 17, Title 50 USCA as Amended" was entered against the appellant. (Tr. pp. 160-161.)

On February 23, 1949, the appellant filed his notice of appeal.

The United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction upon appeal to review the "Judgment Order" and "Order Directing Accounting and Payment under Section 17, Title 50 USCA as amended" by virtue of the provisions of Section 128(a) of the Judicial Code, as amended February 13, 1925, effective May 13, 1925. (43 Stat. L. 936, 28 USCA Sec. 225.)

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#### STATEMENT OF THE CASE.

Shoso Nii, the appellant, was born on January 13, 1914, at Waipahu, Oahu, and is a citizen of the United States (Tr. pp. 242, 292) residing at Waipahu, Oahu, Territory of Hawaii. He took a trip to Japan in the year 1921 and returned to the United States in 1923. (Tr. p. 292.) He was married at the age of 21. (Tr. p. 293.) In June of 1941, he again took a trip to Japan (Tr. p. 293) to visit his father in Japan who was then very ill. (Tr. p. 295.) At the time of leaving in 1941 he had been registered under the United States Selective Service Act (Tr. pp. 294, 443) and received a special permit to leave the United States for a period of five months. (Tr. pp. 295, 444.) He returned from Japan on November 8, 1947. He was not able to return because there was no transportation

(Tr. p. 296) although he made attempts to get transportation back by seeing the American Consul at Kobe, Japan. (Tr. p. 296.)

The appellant's father is Kaneichi Nii and the appellant is the only son. (Tr. p. 298.) The appellant has two sisters, Hatsuko Nii and Florence Nii. (Tr. pp. 212, 298.) Appellant attended the Waipahu Elementary School at Waipahu, Oahu, Territory of Hawaii, and graduated from the said school. The said school consisted of only eight grades. Thereafter he was accepted at the Kalakaua Intermediate School at Honolulu (Tr. p. 298) but did not go to the said school. He instead left school and started working at his father's store at Waipahu. (Tr. p. 298.) The salesman at his father's store was ill and had to leave for Japan so at his father's request the appellant left school. (Tr. p. 299.) Appellant was induced to leave school upon his father's promise "to give me (appellant) everything he (father) owned in the Territory." (Tr. p. 299.) The promise was made often (Tr. p. 299) and it was to take effect "when he (father) died or when he (father) left this country." (Tr. p. 300.) Appellant graduated from Waipahu School in 1928 and on January 2, 1933 he received his father's store from his father by a duly executed bill of sale. (Tr. pp. 300, 308.) At the same time all of appellant's father's bank accounts, checking and savings, were changed to appellant's name. (Tr. p. 309.)

From 1928 when he graduated from the Waipahu School to January 2, 1933, the date of the bill of sale,

appellant "did practically everything that should be done in a store, especially taking orders and deliveries, getting goods from stores in Honolulu, and the major portion of the work of the store was done by me (appellant)." (Tr. p. 309.) Appellant worked seven days a week from 6 A. M. to 11 P. M. each day. (Tr. p. 310.) Appellant's father was not able to drive a car so appellant drove the Ford truck owned by the store. (Tr. p. 310.) His daily routine was to clean up early in the morning, had breakfast; "then went to Honolulu to get merchandise, and I usually came back around, before or right after lunch; then had lunch, then I went out in the camps to take orders and make deliveries that I took the day before. That would take me up to around eight to nine o'clock in the evening. And then I stayed in the store until closing time." (Tr. p. 312.) The store transferred to the appellant in 1933 was not on the properties in dispute but it was and still is on a leased parcel of land not far from the properties in dispute. (Tr. p. 311.) After the store was transferred to the appellant, he supported his father, mother and youngest sister Florence. (Tr. p. 314.) Other rental properties in the back of the store and near the Ball Park were also turned over to the appellant in January, 1933. (Tr. p. 321.)

Appellant was married in 1934 to a girl his father had picked for him from Japan. (Tr. p. 315.) Appellant never saw her till she arrived in Hawaii from Japan and he married her because his father wanted him to settle down because everything was to be given to appellant. (Tr. p. 315.)

The larger parcel in dispute in this case was purchased on December 27, 1932, in the name of Kaneichi Nii. (Tr. pp. 316-317.) At the time of the purchase there was one house on the lot. (Tr. p. 317.) Later two more buildings were put on the same lot. (Tr. p. 317.) The buildings later put on were two-bedroom cottages, that is to say, each house contained two bedrooms, one parlor and a kitchen. (Tr. p. 318.) An outbuilding (bath and toilet) was erected to serve both houses. (Tr. p. 318.) Appellant paid about \$3,000.00 (Tr. p. 321) for the two houses and the outbuilding from the store account. (Tr. p. 318.) A substantial stone wall was built by the appellant around the property to prevent the Waipahu River from overflowing into the property. (Tr. p. 319.)

After the store was turned over to the appellant, appellant collected all rentals from the property in dispute, paid all Territorial taxes on the property or on income derived from the property. (Tr. p. 321.) This continued from January, 1933, to the date of the vesting order, September 12, 1947. (Tr. p. 13.)

In 1921 when appellant visited Japan his father already had in Japan about three acres of land and a home there. (Tr. p. 323.) In 1935, appellant's father's properties in Japan were worth about 100,000 yen of 1935 valuation or about \$30,000.00. (Tr. p. 328.) His holdings in Japan were sufficient to take care of the appellant's father and his wife for the rest of their lives. (Tr. p. 216.)

Appellant's father left for Japan in May, 1935. (Tr. p. 212.) At the dinner table on the last night before

appellant's father left for Japan he gave appellant, orally, all of his properties in Hawaii. (Tr. pp. 364-365.) He was not healthy at the time of his return (Tr. p. 194) and his daughter Hatsuko was ill. (Tr. p. 216.) About three or four days prior to appellant's father's return to Japan in May, 1935, appellant's father stated to witness Eisuke Ikenaga that appellant's father " \* \* \* had definitely decided to return to Japan and that all the properties he (appellant's father) had in Hawaii he (appellant's father) was going to give to Mr. Shoso, his son, and told me that inasmuch as Shoso was a young man for me (Eisuke Ikenaga) to look after them (appellant's family) as though I were in his place." (Tr. p. 246.) Appellant's father also *frequently* told witness Eisuke Ikenaga that with respect to the main parcel in dispute in this case that the property was to be the appellant's. (Tr. p. 247.) On December 17, 1932, appellant's father signed a will purporting to "give, devise and bequeath" to the appellant all of his properties where-soever situated. (Tr. pp. 284, 461.)

The evidence showed that appellant's father owned prior to his departure in May, 1935, 311 shares of the Waipahu Garage Co. Ltd. (Tr. p. 333.) The president of the corporation, witness Eisuke Ikenaga, was told by appellant's father that all of the said shares were transferred to the appellant, so all dividend payments from December, 1936, to December, 1940, totaling \$834.97 were made to the appellant. (Tr. p. 335.) On April 7, 1939, all of the appellant's father's shares were transferred to the appellant. (Tr. p. 333.)

On February 7, 1939, appellant's father and mother, who were then residents of Japan, executed and delivered to the appellant general powers of attorney naming appellant as attorney in fact. They were recorded in the Bureau of Conveyances of the Territory of Hawaii. (Tr. pp. 60-68.)

After appellant's father had permanently returned to Japan, appellant on July 23, 1938, purchased with his own funds a parcel containing 2072 square feet together with a 50% undivided interest in an adjoining lot, area 526 square feet, to be used for right of way purposes. (Tr. pp. 71, 323-324.) This purchase was made in appellant's father's name because the lot purchased adjoined the main parcel in dispute in this case, which was still then in the name of appellant's father.

When appellant's father returned to Japan in 1935, he owned another lot of about 15,198 square feet near the lot in dispute in this case. In the spring of 1941 a witness Oliver Kinney purchased the lot after negotiating with the appellant. Appellant decided on the price after a counter offer was made and Mr. Kinney paid the price to the appellant. (Tr. pp. 303-304.) The money was put into the appellant's account. (Tr. pp. 320.)

A deposition was taken by the appellant of appellant's father. (Tr. pp. 30-36, 207-221.) Appellant's father answered in response to the questions as follows:

Q. Just prior to your last departure from Hawaii to Japan, did you own any real properties in Hawaii?

A. Yes, land about  $\frac{3}{4}$  of an acre.

Q. What did you do with all of your real properties in Hawaii when you last left Hawaii for Japan?

A. After returning to Japan, I made a power of attorney to Shoso Nii at the American Consulate in Kobe about December, 1935, to dispose of my properties in Hawaii.

The foregoing is a brief summary of evidence which was presented to the trial Court. The appellee did not introduce any evidence to dispute any of the evidence above stated.

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#### **SPECIFICATION OF ERRORS.**

1. The Court erred in holding that the appellant failed to prove his interest in the vested properties by a preponderance of credible evidence in that appellant proved his interest in the properties by credible undisputed evidence far in excess of the requirement of preponderance of evidence.

2. The Court erred in holding that even if appellant established his claim of equitable title in and to the properties in dispute, the appellant would still not be able to recover because the Attorney General as successor to the Alien Property Custodian was entitled to rely upon the record title in the same manner and to the same extent as a bona fide purchaser would have been in that:

(a) The manner and form by which the said Attorney General as successor to the Alien Property Custodian

todian obtained his title to properties did not make him a bona fide purchaser or a person of equivalent status thereto.

(b) That the undisputed evidence showed that actual possession by tenants of Shoso Nii, appellant, was notice enough to the Alien Property Custodian to prevent him from having the status of a bona fide purchaser.

3. The Court erred in holding that the Attorney General of the United States as successor to the Alien Property Custodian was entitled to judgment on the counterclaim and ordering the appellant to account under said counterclaim to the said Attorney General all of the net income from the real property vested under Vesting Order No. 9777 for the period May 1, 1935, to and including October 1, 1947, in that by proof far in excess of the requirement of preponderance of credible evidence, appellant proved that the real property in question out of which the rentals arose was given to the appellant, Shoso Nii, on or about May, 1935, by his father, Kaneichi Nii, and between May 1, 1935, to and including October 1, 1947, the property out of which the rentals were collected was that of Shoso Nii, the appellant, solely.

4. The Court erred in entering the order under Section 17 U.S.C.A. Title 50 directing the appellant, Shoso Nii, to pay to the Attorney General of the United States as successor to the Alien Property Custodian the sum of \$3,169.01 pursuant to the Turnover Directive in that at the time said order was issued the

Court had no jurisdiction to issue such a summary order, when the Court refused to grant the motion under Section 17 U.S.C.A. Title 50 and went ahead with the hearing of the case on its merits it lost its jurisdiction to order any payments under the said motion under said Section 17 U.S.C.A. Title 50.

5. The Court erred in entering the order under Section 17 U.S.C.A. Title 50 directing the appellant, Shoso Nii, to account for and pay over to the Attorney General the net income from the vested property for the period from May 1, 1935, to and including July 1, 1941, in that the Court at the time said order was issued had no jurisdiction to enter such a summary order the Court having once refused the motion under said Section 17 U.S.C.A. Title 50 and having gone ahead with the hearing on the merits of the case and further under Section 17 U.S.C.A. Title 50 the order, if any, must be for a sum certain and a debt in "prae-senti".

6. That the Court erred in deciding the case against the appellant and in favor of the defendant in spite of the overwhelming testimony adduced by the appellant in his favor by the Court's meticulous and undue emphasis on the evidence by deposition of Kaneichi Nii wherein deponent stated, "I made a power of attorney to Shoso Nii in Kobe about December, 1935, to dispose of *my properties* in Hawaii" (emphasis ours) when such reference to "*my properties*" was entirely proper in that as far as the bare legal title was concerned it still was Kaneichi

Nii's, the deponent; that the said statement was the only evidence against the entire evidence for the appellant in the entire case and appellant clearly proved his case by a preponderance of evidence.

7. That the Court erred in holding upon the evidence adduced that appellant did not acquire title to the parcels in dispute by way of adverse possession.

8. That the Court erred in refusing to make the following findings of fact:

(a) That from the time Kaneichi Nii left for Japan in 1935 up to the effective date of the vesting order, Shoso Nii collected as his own all rentals from the property in dispute; that Shoso Nii paid to the Territory of Hawaii in Shoso Nii's name gross income taxes on the gross rental derived from the premises; that Shoso Nii paid to the Territory of Hawaii in Shoso Nii's name net income taxes due to the Territory of Hawaii for the rental collected; that Shoso Nii paid to the United States of America through the Bureau of Internal Revenue net income taxes in the name of Shoso Nii on the rentals collected; that Shoso Nii paid for all expenses of up-keep of the property; that between June, 1941, to the date of the vesting order above mentioned Shoso Nii acted under and through his attorney-in-fact Katsutoshi Mikami who held a duly executed and recorded power of attorney signed by Shoso Nii which is in evidence in this cause;

(b) That during Shoso Nii's visit to Japan in 1941 he was unable to return to Hawaii because of

the intervening war; that he returned to Hawaii on November 8, 1947; that during said period June, 1941, to November 8, 1947, he was a resident of the Territory of Hawaii; that at the time of filing of this suit Shoso Nii was a resident of the Territory of Hawaii;

(c) That appellant, Shoso Nii, on or about 1928 graduated from the eighth grade of Waipahu Elementary School and made application for registration at the Kalakaua Junior High School in Honolulu; that he was accepted for enrollment by the said Kalakaua Junior High School; that he did not continue his studies there but instead helped Kaneichi Nii, his father, at said Kaneichi Nii's store; that said Kaneichi Nii at said time and repeatedly thereafter promised Shoso Nii all of said Kaneichi Nii's property in Hawaii at the time of said Kaneichi Nii's death or if said Kaneichi Nii left for Japan if Shoso Nii left school and helped at the said store; that the fact that there was such an agreement is corroborated by the testimony of Mr. Ikinaga and by the evidence of written entries made in the books of the Waipahu Garage, Ltd., a corporation in which Kaneichi Nii was a record stockholder up to 1939 showing that in spite of the fact that Kaneichi Nii remained the record stockholder, Shoso Nii received dividends in the name of Shoso Nii up to the time of the change of the stock record; that said Shoso Nii relied on said promise and gave up going to school and without any wages put in long hours of work every day including Sundays helping at the Kaneichi Nii's store up to January 2, 1933;

(d) That as of January 2, 1933, Kaneichi Nii, the father, desired to partially and prematurely execute the aforementioned promise and made a gift of the father's store located at Waipahu to Shoso Nii; that Kaneichi Nii made, executed and delivered a bill of sale which was duly recorded, and effectively made a gift of said store to said son; that bank accounts in the name of the father at the Waipahu Branch of the Bank of Hawaii were also transferred to the son when the bill of sale was made;

(e) That on the 17th day of December, 1932, said Kaneichi Nii made and signed a document purporting to be a will in accordance with the promise aforementioned in subparagraph (c) bequeathing all of his properties, both real and personal, to the appellant;

(f) That appellant in reliance on the promise aforementioned in subparagraph (c) built two (2) two-bedroom houses on the premises in dispute and a substantial stone wall to keep the water of the Waipahu River from flooding the premises at the total expense to him of about \$3,000.00;

(g) That in 1938 the appellant negotiated for the purchase of the second and smaller parcel of real estate which is part of the property involved in this proceeding and serves as a right of way to the larger parcel in dispute; that the appellant was able to direct the form and in whose name this deed was to be executed; that the appellant caused title to the second parcel of real estate to be taken in the name of

his father, Kaneichi Nii, because the right of way was to be appurtenant to the main parcel; that appellant at that time knew that title to the larger parcel of real estate was in the name of his father, Kaneichi Nii; that the entire consideration for the small parcel was paid by Shoso Nii;

(h) That subsequent to May, 1935, up to the date of the vesting order, appellant had possession of the premises in dispute; his tenants lived on the premises in dispute;

(i) That for more than ten (10) years continuously and without interruption appellant had the open, exclusive, adverse and continuous possession of the premises in dispute;

(j) That in 1935 just before Kaneichi Nii's departure to Japan said Kaneichi Nii orally told Shoso Nii he did give all of his properties to the appellant; that said gift was in accordance with the promise aforementioned in subparagraph (c);

(k) That appellant's father had to leave for Japan in 1935 sooner than he had expected rather suddenly because of the sudden aggravation of the illness of his daughter who was then ill in Japan; that the fact that she was ill is well established by the testimony of her husband Jinichi Tsumoto;

(l) That because Kaneichi Nii had to depart suddenly for Japan in 1935, no deed of any nature whatsoever was executed by Kaneichi Nii; that there was another parcel of property in Waipahu which re-

mained in the name of Kaneichi Nii close to the property in dispute; that in 1940 Shoso Nii sold this property to Attorney Oliver Kinney and kept for himself the consideration paid by said Attorney Oliver Kinney.

9. That the Court erred in refusing at the end of the case to permit the appellant to file his amended complaint to amend his complaint to meet the proof in the case.

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#### **SUMMARY OF ARGUMENT.**

1. Since Alien Property Custodian does not depart with valuable consideration the acquisition of title by way of vesting does not make Alien Property Custodian a bona fide purchaser or one equivalent thereto under Hawaiian Recording Statute. Rule of constructive notice of possession by beneficial owner also applies to Alien Property Custodian.

2. Since appellant was in open, exclusive, adverse, continuous and uninterrupted possession of large parcel for more than 10 years appellant was owner thereof by way of adverse possession.

3. There was an overwhelming amount of evidence in support of appellant's contention of parol gift of the larger parcel and Court erred in holding that appellant did not prove his beneficial interest in the larger parcel. That with relation to the smaller parcel the law of resulting trust applied and appellant was by reason thereof beneficial owner.

4. Appellant should have been permitted to amend complaint under Rule 15 (b) of the Rules of Civil Procedure to meet the proof in the case.

5. That the issuance by the trial Court of the "Order Directing Accounting and Payment Under Section 17, Title 50 U.S.C.A. as Amended" (Tr. pp. 160-161) was in error in that the "Judgment Order" (Tr. p. 158) fully covered the situation and furthermore once the trial Court went into the merits of the case it lost its jurisdiction under Section 17 aforementioned to issue the said order.

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## ARGUMENT.

### I.

**ALIEN PROPERTY CUSTODIAN DOES NOT STAND IN SAME POSITION AS A BONA FIDE PURCHASER FOR VALUE UNDER HAWAIIAN RECORDING STATUTES.**

It is respectfully submitted that the Alien Property Custodian does not stand in a same position as a bona fide purchaser under the Hawaiian recording statutes. The trial Court found that with respect to the lands involved in this case, the titles to both properties were not Land Court titles. (Tr. p. 147.) Therefore, the only applicable provision in this case is Section 12756 of the Revised Laws of Hawaii 1945, which reads as follows:

"All deeds, leases for a term of more than one year, or other conveyances of real estate within the Territory, shall be recorded in the bureau of

conveyances. Every such conveyance not so recorded shall be void as against any subsequent purchaser, in good faith and *for a valuable consideration*, not having actual notice of the conveyance, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded."

The Alien Property Custodian or his successors are certainly not purchasers for a valuable consideration. In their act of vesting they do not depart with any valuable consideration. Even when the Territory of Hawaii exercises its powers of eminent domain, it does not rely on the record title. Section 311 of the Revised Laws of Hawaii 1945 provides for notices by publication and Section 312 permits intervention by interested parties. Section 313 provides as follows:

"The court shall have power to determine all adverse or conflicting claims to the property sought to be condemned and to the compensation or damages to be awarded for the taking of the same."

It has been repeatedly held that Alien Property Custodian can take under its vesting powers no more than what the alien enemy had. In *U. S. v. San Leonardo*, 51 F. Supp. 107, the Court held:

"The Alien Property Custodian could not however, take any greater interest in property seized than the alien enemies had \* \* \*"

See: *Reising v. Deutsche*, 15 F. (2d) 259; *Miller v. Robertson*, 266 U.S. 243, 45 Sup. Ct. 73; *Von*

*Schwerdtner v. Piper*, 23 F. (2d) 862; *In re Knutzen's Estate*, 191 P. (2d) 747; *In re Carrington's Estate*, 81 N.Y.S. (2d) 77. Furthermore, in construing the Trading with the Enemy Act it must be kept in mind that it is the dominant purpose of the Trading with the Enemy Act to give citizens an adequate remedy for invasions of their property rights in exercise of the war powers of the government. *Pflueger v. U. S.*, 121 F. (2d) 732.

It is therefore submitted that the Alien Property Custodian is not in an identical, same or similar position as a bona fide purchaser.

Even if the Alien Property Custodian's status were equivalent to that of a bona fide purchaser still the appellant was in exclusive possession of the premises through his tenants (Tr. p. 321) and the Alien Property Custodian took with constructive notice. In *Yee Hop v. Young Sak Cho*, 25 Haw. 494, the Supreme Court of Hawaii held with respect to Section 12756 of the Revised Laws of Hawaii 1945 (the statute then in effect being identical):

“The general rule is that when a party purchases or leases real estate in the possession of another not his vendor or lessor he is chargeable with knowledge of all the rights of the party in possession.”

In the situation where legal title to a patent remains in an enemy alien and the Alien Property Custodian vests said patent, it is never argued and no Court has ever held that the Alien Property Custodian is a bona

fide purchaser. Instead, the legal title to the patent will be returned to one who proves beneficial ownership. *Rudenberg v. Clark*, 72 F. Supp. 381. The situation in the present case is identical.

Under the authorities and statutes above cited, it is submitted that the trial Court's holding that "the Custodian stands in the same position as a bona fide purchaser for value, thus cutting off any and all equities \* \* \*," was in compete error.

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## II.

COURT'S REFUSAL TO MAKE A FACT FINDING REGARDING ADVERSE POSSESSION WAS ERRONEOUS AND THIS COURT SHOULD MAKE FINDING OF ADVERSE POSSESSION.

On December 15, 1948, forty-two days before the trial Court made its fact findings the appellant filed a "Motion for Findings of Facts" (Tr. pp. 137-144) and in Paragraph 18 thereof requested the following finding:

"18. That for more than ten (10) years continuously and without interruption plaintiff had the open, exclusive, adverse and continuous possession of the premises in dispute." (Tr. p. 143.)

The Court completely ignored this request and did not make any fact finding in spite of the following allegation in the plaintiff's complaint:

Paragraph VII \* \* \* "that subsequently to May 1935, for more than 10 continuous years, the

plaintiff took possession of the premises and openly, exclusively, adversely, continuously and without interruption held himself to be the owner of the premises aforescribed against the entire world; that since May 1935, he possessed said property and collected all rentals due from the premises and kept the said rentals for his own use; that since May 1935, he paid all Territorial real property taxes on the premises; that since May 1935 he considerably improved the premises with permanent improvements at his own labor and expense; that since May 1935, he controlled the property in every respect as if he owned the property \* \* \*” (Tr. p. 6.)

Appellant has in Paragraph 8 (i) reserved this point in his “Statement of Points.” (Tr. p. 492.)

Under the Territorial laws, the period of continuous possession required is 10 years. See Section 10439 of the Revised Laws of Hawaii 1945 which reads as follows:

“Sec. 10439. Ten years. No person shall commence an action to recover possession of any lands, or make any entry thereon, unless within ten years after the right to bring such action, first accrued.”

In *MacFarlane v. Damon, et al.*, 10 Haw. 495, the Court held that a parol gift of land following adverse possession for a period longer than the statutory period aforementioned cannot be disturbed. In view of this Hawaiian decision, it is difficult to see how the Court could have completely ignored appellant's request.

It is respectfully submitted that this Court has jurisdiction to make fact findings in an equity case on appeal upon the evidence presented where the trial Court did not make fact findings. *Howarth v. McCord Radiator and Manufacturing Co.*, 100 F. (2d) 326.

The evidence below supporting adverse possession as to the larger parcel in dispute was not only parol but was adequately supported by documentary evidence by way of Tax returns introduced in evidence. (Tr. pp. 413-442.) The undisputed and uncontradicted testimony of the appellant was that the appellant collected all rentals from the property in dispute, paid all Territorial real property taxes from May 1935 to September 1947. (Tr. p. 321.) This is supported by the further uncontradicted testimony of Henry Jinichi Tsumoto (Tr. p. 195) and Shigeo Matsuura, the accountant. (Tr. pp. 264-292.) The accountant testified that the appellant's net income tax returns for 1938 to 1947 reflected rentals collected by appellant for the said years from the large parcel in dispute herein (Tr. p. 277) and also real property taxes paid by appellant. (Tr. pp. 278-279.)

It is submitted that upon the evidence submitted this Court find that appellant by his 10 years of continuous uninterrupted, open, exclusive and adverse possession of the large parcel in dispute was the owner thereof and the appellee be ordered to return said property to the appellant.

## III.

DID THE TRIAL COURT ERR IN HOLDING THAT THERE WAS  
NOT SUFFICIENT EVIDENCE TO SUPPORT A PAROL GIFT  
OF REAL ESTATE?

It is respectfully submitted that on the evidence submitted in the trial Court below, the Court seriously erred in holding that there was no parol gift of realty with relation to the larger parcel.

This case is equitable in nature and must be considered as an equity suit. See *Standard Oil Co. v. Clark*, 163 F. (2d) 917 (cert. den.), 333 U.S. 873, 68 S. Ct. 901. Furthermore Section 9(a) under the Trading with the Enemy Act, 50 U.S.C.A. Sec. 9a, provides that suits for return of property shall be in equity.

It is submitted that generally in considering equity cases on appeal, the reviewing Court is not required to accept fact findings of the trial Court on disputed issues in the same sense that it accepts a jury's verdict in a law action respecting an issue over which there is a dispute and if on the whole record the evidence decidedly preponderates against the findings of the trial Court, the reviewing Court is not bound by such findings. *Howarth v. McCord Radiator and Manufacturing Co.*, 100 F. (2d) 326. In an appeal in equity, the Circuit Court of Appeals reviews the facts as well as the law and the review is a real review and not a perfunctory approval. *National Manufacturers and Stores Corp. v. Whitman*, 93 F. (2d) 829. While there is a presumption that the trial Court decided a question of evidence correctly, the judg-

ment must be reversed where the finding of the Court is clearly without support. *Aetna Life Ins. Co. v. Kern-Bauer* (C.C.A. 10), 62 F. (2d) 477. It is true that this Court in *Chas. V. Lilly Co. v. I. F. Laucks* (C.C.A. 9), 68 F. (2d) 175, held that in an equity appeal if the evidence is conflicting fact findings will not be disturbed *unless there is an obvious mistake of fact*.

But it is submitted that where the evidence mainly relied upon by the trial Court, as in the present case, was by way of a deposition the same rule should not be applicable and this Court may draw its own inferences and make fact findings from the deposition. In *Africa Maru* (C.C.A. 12), 54 F. (2d) 265, the Court held that where the evidence in the trial Court was by depositions, the Court on appeal will examine the depositions to determine the weight of the evidence. See also *Midland Flour Milling Co. v. Babbitt* (C.C.A. 8), 70 F. (2d) 416, where it was held that findings of fact based on depositions are not entitled to the same weight which they would have had if the witness had testified in open Court. See also *Anderson v. Baldwin Law Publ. Co.* (C.C.A. 6), 27 F. (2d) 82.

The rule that an Appellate Court will itself weigh findings based on depositions and is not bound by the findings of the trial Court is similarly applied to fact findings made on documentary evidence. In *Kind v. Clark*, 161 F. (2d) 36, the Court held:

“In so concluding we rely on the documentary evidence which we are in as good a position as the trial judge to determine.”

See also: *Globe-Union v. Chicago Telephone Supply Co.*, 103 F. (2d) 722; *Cuttler-Hammer, Inc. v. Chicago Telephone Supply Co.*, 103 F. (2d) 732; *Letcher County, Ky. v. De Foe*, 151 F. (2d) 987; *Sun Ins. Office of London v. Be-Mac Transport Co.*, 132 F. (2d) 535; *Equitable Life Assur. Soc. of U. S. v. Irelan*, 123 F. (2d) 462; *Banister v. Solomon*, 126 F. (2d) 740; *Johnson v. Griffiths S. S. Co.*, 150 F. (2d) 224, and *Bowles v. Beatrice Creamery Co.*, 146 F. (2d) 774.

The trial Court seized and based its decision on the following question and answer of appellant's father whose deposition taken before the American Consul at Kobe, Japan, was read into the record (Tr. pp. 210-220):

"Question 13. What did you do with all of your real properties in Hawaii when you last left Hawaii for Japan?"

"Answer. After returning to Japan, I made a power of attorney to Shoso Nii at the American Consulate about December, 1935, to dispose of *my properties* in Hawaii." (Emphasis ours.) (Tr. pp. 213-214.)

The question and answer was allowed over *appellee's* objection. It is interesting to note that the order permitting the taking of the deposition (Tr. pp. 30-31) permitted the appellee to propound cross interrogatories and recross interrogatories but appellee defaulted by permitting time to lapse and permitted the deposition to be taken only on the direct questions of the appellant. In other words the answer to ques-

tion 13 aforementioned was not only objected to by the appellee but later became a "windfall" benefit to the appellee, much to appellee's surprise.

In the Court's Opinion (Tr. p. 156) the Court stated:

"May be the father misled the son, but the uncontradicted evidence is that the father states he gave the son a power of attorney to deal with 'my' property in Hawaii and the plaintiff accepted it and acted under it."

The Court without doubt based its entire opinion on the words "my property". *In one sense the property was the father's because the legal title was in his name, but the beneficial interest was in the appellant.* The appellant was caught short on a deposition taken by him by a narrow interpretation given it by the Court. The Court closed its eyes to the testimony with relation to beneficial interest referred to in the preceding "Statement of the Case" and the Court shunned the overwhelming documentary proof supporting the appellant's case. The same trial judge in *Fujino v. Clark*, 71 F. Supp. 1, affirmed by this Court in 152 F. (2d) 384, held that:

"\* \* \*, it is permissible to look through and beyond the technicalities of the law of conveyancing to the realities \* \* \*. Family arrangements are subject to close examination, and *factual control is more significant than the niceties of legal title.*" (Emphasis ours.)

Now that the shoe is on the other foot, must sound legal theories be forgotten because parties have interchanged?

The Court's finding that the statement of the appellant's father "my property" is "*uncontradicted*" is difficult to follow because all of the rest of the evidence parol and documentary contradicts it. From the very deposition on which the Court puts much reliance on it appears that the deposition was made on an English to Japanese and Japanese to English translation, that the deponent was of a feeble age of 71, that he stated that there was no bill of sale to the store which is absolutely contrary to the documentary evidence in the case, that the date he gives for the power of attorney, December 1935, is absolutely erroneous in that the power of attorney was made on February 7, 1939. (Tr. pp. 210-217.) In spite of these glaring misstatements by a 71-year old non English speaking alien Japanese—the Court chose to make its entire decision on the ambiguous words "my properties" and closed its eyes to better evidence before it. It must be remembered that the appellant is a United States citizen and his property was taken and the Trading with the Enemy Act already imposes a burden on him to prove his case to recover the property. The trial Court by deciding the case in the way it did not only increased his already unfair burden but made the burden impossible by its very narrow interpretation of the words "my property."

Depositions should be scanned with great care, *Smith v. Smith*, 25 N.Y.S. (2d) 448, 261 App. Div. 930. The Court in considering a deposition, appraises effect of any answer by its proper context and should

decline to attribute to a manifestly inept and inadvertent answer a significance that is conclusively negated by its entire setting, *U.S. ex rel. Lawrence v. Commanding Officer of McCook Army Air Field*, 58 Fed. Supp. 933.

Furthermore, the testimony of witnesses Ikenaga, Kinney, Tsumoto and Matsuura which was not impeached or contradicted cannot be disregarded by the trial Court. *San Francisco Ass'n. for the Blind v. Industrial Aid for the Blind*, 152 F. (2d) 532, *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 51 S. Ct. 453, 75 L. Ed. 983.

The law of parol gift of real estate is well settled in Hawaii. In *Vierra v. Shipman*, 26 Hawaii 269, the facts were that one Baker, who owned certain real estate with cattle and other personalty thereon, together conducted as a cattle ranch, promised Vierra that if he would accept employment on said ranch and perform certain services thereon from that time until Baker's death, without wages and without compensation other than his food and clothing, he, Baker, would devise and bequeath to him the said ranch. Vierra accepted the employment and performed all the services during the remainder of Baker's life, fully and satisfactorily to Baker. At the time of entering into the undertaking Vierra was sixteen years of age and planned to take, if possible, a course in agriculture. The performance of his duties on the ranch necessarily rendered impossible any course of study as planned. It was held that under these circumstances there was part performance and that

Baker's promise is enforceable in equity. The Court commented:

"His situation is now entirely changed. The opportunity for study with the enthusiasm of youth and without the influences that have necessarily been exercised upon him by his occupation on the ranch is irretrievably lost. \* \* \* Courts of equity will not permit the statute of frauds to be so applied as to make it an instrument of fraud."

The appellant will also be "misled" and his education irretrievably lost if the trial Court's decision is followed. In fact the trial Court states "May be the father misled the son". (Tr. p. 156.) *It is for this type of misleading that a Court of Equity steps in and prevents injustice.*

There is abundant evidence of permanent improvements made by the appellant relying on his father's representations. Two houses and an outhouse at an expense greater than the original price of the lot were built by the appellant. (Tr. pp. 318-319.) A wall to keep the Waipahu river was built also by the appellant. In *Yee Hop v. Young Sak Cho*, 25 Hawaii 494, the Court in specifically enforcing a parol agreement to give a lease stated:

"Courts of equity exercise their jurisdiction in decreeing specific performance of verbal agreements where there has been part performance for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the statute of

frauds, after the other party to the contract has, *upon the faith of such engagements expended his money or otherwise acted in execution of the agreement.* Under such circumstances the court will prevent such injustice from being effected.”

In *Mackall v. Same*, 135 U. S. 167, 10 S. Ct. 705, the Court following the same doctrine stated:

“A party who receives a parol gift of real estate, enters into possession and expends money in improvements thereon, presents equitable considerations which will uphold a decree establishing a subsequent conveyance as a confirmation of his equitable title.”

At this point it is important to note that the appellee did not plead the Statute of Frauds as is required by Rule 8C of the Federal Rules of Civil Procedure.

The trial Court throughout its Findings of Fact (Tr. pp. 145-151) and Opinion (Tr. pp. 153-157) appears to have been uncertain with relation to the proof of beneficial interest and no where in the Fact Finding or the Opinion does it expressly make a finding. On page 153 of the transcript (7 lines from the bottom) the words “do not bring a conviction” are used. And on page 156 at the bottom it is stated that the trial Court is not satisfied by the use of the following dubious language:

“And even if I were satisfied with the plaintiff’s story—which I am not—as to the larger parcel and also as to the smaller one \* \* \* plaintiff cannot here recover is that the Custodian was entitled to rely upon the record title.”

It is submitted that a trial Court must find or not find facts with certainty and not make excuses to find facts in a dubious manner straddling on unfounded doctrines of bona fide purchasers. The very fact that the trial Court straddled the question shows that it was not certain of its dubious fact findings.

As for the smaller parcel, 2072 square feet, purchased by the appellant on July 23, 1938 together with the right of way over 526 square feet lot, the case is clearly one of resulting trust. The entire consideration was paid by the appellant. (Tr. pp. 323-324.) In *Ishida v. Naumu*, 34 Haw. 363, the Court held:

“ ‘An express trust is created only if the settlor manifests an intention to create it \* \* \* although the manifestation may be made by written or spoken words or by conduct \* \* \* A person who seeks to establish the existence of an express trust must show that the settlor manifested an intention to create it. On the other hand, in the case of a resulting trust it is not necessary to show that the settlor manifested an intention to create it. A person who seeks to establish the existence of a resulting trust does so by showing circumstances which raise an inference that the person making or causing a transfer of property did not intend to give to the transferee the beneficial interest in the property. Since the transferee is not to have the beneficial interest and since no other effective disposition is made of it, the person who made or caused the transfer of his estate is entitled to it. A resulting trust is imposed for the purpose of carrying out what it appears from the circumstances under which

a disposition of property is made would probably have been the intention of the person making the disposition if he had thought of the matter. \* \* \* If a person purchases property but takes title in the name of another, the inference is that he did not intend the transferee to have the beneficial interest, but that the transferee should hold the property for the benefit of the purchaser. \* \* \* The trustee of a resulting trust, like the trustee of an express passive trust, is ordinarily under a duty merely to convey the property to the beneficiary or in accordance with his directions \* \* \* Thus, if a transfer of property is made to one person and the purchase price is paid by another, it is the duty of the transferee to convey the property to the person who paid the purchase price whenever he demands such conveyance. \* \* \* A resulting trust arises where a transfer of property is made under circumstances which raise an inference that a person making a transfer or causing a transfer to be made did not intend the transferee to have the beneficial interest in the property transferred.' Restatement, Trusts, pp. 1246-1249."

It is respectfully submitted that for the reasons stated and under the authorities cited appellant proved his interest in both parcels by the overwhelming evidence.

## IV.

RULE 15 (b) PERMITS AMENDMENTS TO PLEADINGS  
TO CONFORM TO PROOF.

The appellant before the trial of the cause by a written motion supported by affidavit (Tr. pp. 110-113) offered an amended complaint (Tr. pp. 113-126) to meet the proof in the case. The motion was denied by the trial Court. (Tr. p. 176.) After the trial of the cause the motion was renewed but again the Court refused the amendment. (Tr. p. 397.)

It is submitted that the trial Court should have allowed the amendment to conform the pleadings to the evidence which was adduced at the trial. The main change in the complaint is the allegations in paragraph V with relation to the promise to give all of the properties in Hawaii and the reliance thereon by the appellant. (Tr. p. 115.)

Rule 15 (b) reads as follows:

“Rule 15 (b). ‘Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so

freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

It is a liberal rule and the trial Court should have permitted the amendment in view of the fact that it allowed evidence to support appellant's allegations in the amended complaint.

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## V.

**THAT TRIAL COURT HAD NO JURISDICTION TO ISSUE THE  
"ORDER DIRECTING ACCOUNTING AND PAYMENT UNDER  
SECTION 17, TITLE 50 U.S.C.A. AS AMENDED".**

The "Order Directing Accounting and Payment Under Section 17, Title 50 U.S.C.A. as Amended" requires the appellant to pay on or before February 23, 1949 the total sum of \$3,169.01. (Tr. p. 161.) The "Judgment Order" merely requires the appellant to "account for and pay over" on or before February 23, 1949 the net income from the vested property. (Tr. p. 160.)

It is submitted that both Section 17 and Section 9 (a) of the Trading with the Enemy Act are parts of the same act and they should be construed in the light and purpose of the act.

If the amount ordered to be paid under the Section 17 order (\$3,169.01) is more than the amount finally

determined under the "Judgment Order", must the appellant pay the \$3,169.01? The issuance of two orders will result in a confusion. The "Judgment Order" made on the merits of the case was all that was necessary and once a Court goes into the merits of a case the necessity of a Section 17 order is dispensed.

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### CONCLUSION.

It is respectfully submitted that the "Judgment Order" and the "Order Directing Accounting and Payment Under Section 17, Title 50 U. S. C. A. as Amended" of the Court below should be reversed and an appropriate order be entered by this Court ordering the return of appellant's properties.

Dated, Honolulu, Hawaii,  
September 14, 1949.

Respectfully submitted,

SHIRO KASHIWA,

*Attorney for Shoso Nii, Appellant.*

